

82-1414
NO.

Office-Supreme Court, U.S.

FILED

FEB 22 1983

ALEXANDER L. STEVAS,

CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1982

PRATT-FARNSWORTH, INC.,
HALMAR, INC., NEW ORLEANS
DISTRICT, ASSOCIATED GENERAL
CONTRACTORS OF LA., INC.,
AT-LARGE DISTRICT, ASSOCIATED
GENERAL CONTRACTORS OF LA., INC.,
Petitioner,

v.

CARPENTERS LOCAL UNION NO.
1846 OF THE UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF
AMERICA, AFL-CIO, ET AL,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
VOLUME I**

JAMES BURTON
H. BRUCE SHREVES
Simon, Peragine, Smith
& Redfern
4300 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 522-3030
COUNSEL FOR PETITIONER
PRATT-FARNSWORTH, INC.
AND HALMAR, INC.

FREDERICK S. KULLMAN
(COUNSEL OF RECORD)
MICHAEL S. MITCHELL
Kullman, Lang, Inman & Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
Telephone: (504) 524-4162
COUNSEL FOR
PETITIONER

QUESTIONS PRESENTED

1. Whether a district court has, in the first instance, authority to determine an appropriate bargaining unit.

2. Whether the Fifth Circuit Court of Appeals properly applied this Court's decision in *South Prairie Construction Co. v. Local 627, Int'l Union of Operating Engineers*, AFL-CIO, 425 U.S. 800 (1976) [Peter Kiewit] when it concluded that a district court has authority to determine whether two construction companies are a single employer, whether their employees are a single bargaining unit, and whether the union represents a majority of the employees in the single unit.

3. Whether the Fifth Circuit Court of Appeals properly applied this Court's decision in *Republic Steel v. Maddox*, 379 U.S. 650 (1965), *Vaca v. Sipes*, 386 U.S. 171 (1967) and other decisions when it held that attempted exhaustion of contractual remedies is a prerequisite to a suit under Section 301 of the Labor Management Relations Act, 29 USC §185(a) only if the contractually provided for remedies are mandatory.

4. Whether a union's claim that agreements between employers' associations and double-breasted construction companies injured the union in its business and weakened its ability to represent its members states a cause of action under the antitrust laws.

RULE 28.1 STATEMENT

Parties to this case are:

Carpenters Local Union, No. 1846 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO—Plaintiff

Carpenters District Council of New Orleans and Vicinity Pension Trust—Plaintiff

Carpenters District Council of New Orleans and Vicinity Health and Welfare Plan—Plaintiff

Carpenters District Council of New Orleans and Vicinity Apprenticeship Educational and Training Program—Plaintiff

William John Fortney, Kenneth J. Perkins, Donald C. Haynes, Rayford H. Colamari, Lothard J. Broussard, Sr., Franklin B. Hunter, Elaire Dauzat, Dennis J. Savoy, Lawrence J. Rousselle, Desire Bergeron, Vernon D. Harvey, and William J. Brignac, Jr.,—Plaintiffs

James E. Crawford, Lawless J. Martin, Robert Brown, Charles Mitchell, Nathaniel E. Williams, Johnnie Williams, Fred Scott and Lee R. Miskell—Plaintiffs

James E. Crawford, Lawless J. Martin, Robert Brown, Nathaniel E. Williams and Lee R. Miskell—Plaintiffs

Pratt-Farnsworth, Inc.—Defendant

Halmar, Inc.—Defendant

New Orleans District, Associated General Contractors of Louisiana, Inc.—Defendant

At-Large District, Associated General Contractors of Louisiana, Inc.—Defendant

Barker, Boudreaux, Lamy, Gardner & Foley—Attorneys for Plaintiffs

Jerry L. Gardner, Jr.—Attorney for Plaintiffs

Marie Healey—Attorney for Plaintiffs

Kullman, Lang, Inman & Bee—Attorneys for Defendants

Frederick S. Kullman—Attorney for Defendants

Michael S. Mitchell—Attorney for Defendants

Simon, Peragine, Smith & Redfearn—Attorneys for Defendants Pratt-Farnsworth, Inc., and Halmar, Inc.

James Burton—Attorney for Defendants Pratt-Farnsworth, Inc., and Halmar, Inc.

H. Bruce Shreves—Attorney for Defendants Pratt-Farnsworth, Inc., and Halmar, Inc.

TABLE OF CONTENTS

	PAGE
Questions Presented.....	i
Rule 28.1 Statement.....	ii
Table of Contents.....	iv
Table of Authorities.....	v
Opinions Below.....	2
Jurisdiction.....	2
Statutes Involved.....	2
Statement of the Case.....	3
Reasons for Granting the Writ.....	5
I. The Decision Allowing a United States District Court to Determine, in the First Instance, An Appropriate Bargaining Unit Is Wrong.....	5
A. The Decision Is Contrary to Supreme Court Precedent.....	5
B. The Decision Conflicts with the Decisions of Other Circuit Courts Of Appeals.....	12
II. Both the ERISA and the Section 301 Allegations Should Have Been Dismissed for Failure to Exhaust Administrative Remedies.....	19
III. This Controversy Is a Labor Dispute and Therefore Exempt from the Federal Antitrust Laws.....	21
Conclusion.....	28
Certificate of Service.....	29
Appendix A.....	Vol. II—A-1
Appendix B.....	Vol. III—B-1
Appendix C.....	Vol. III—C-1
Appendix D.....	Vol. III—D-1
Appendix E.....	Vol. III—E-1

TABLE OF AUTHORITIES

CASES	PAGE
<i>Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.,</i> 404 U.S. 157 (1971).....	8
<i>Amato v. Bernard,</i> 618 F.2d 559 (9th Cir. 1980).....	21
<i>Apex Hosiery Co. v. Leader,</i> 310 U.S. 469 (1940).....	21, 22, 24
<i>Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.,</i> 511 F.Supp. 509 (E.D. La. 1981) rev'd in part 690 F.2d 489 (5th Cir. 1982).....	1, 24
<i>Computer Sciences Corp. v. N.L.R.B.,</i> 677 F.2d 804 (11th Cir. 1982).....	19
<i>Connell Construction Co. v. Plumbers Union, Local 100,</i> 421 U.S. 616 (1975).....	2, 26
<i>Corporate Printing Co. v. New York Typographical Union No. 6,</i> 555 F.2d 18 (2d Cir. 1977).....	26
<i>Couchigian v. Rick,</i> 489 F.Supp. 54 (D. Minn. 1980).....	19
<i>Fox v. Merrill Lynch & Co., Inc.,</i> 453 F.Supp. 561 (S.D. N.Y. 1978).....	21
<i>Federal Power Commission v. Idaho Power Co.,</i> 344 U.S. 17 (1952).....	7
<i>H. A. Artists & Associates v. Actors Equity Assn.,</i> 451 U.S. 704 (1981).....	23, 24
<i>Hammil v. Hoover Ball & Bearing Co.,</i> — F.Supp. —, 85 LRRM 2231 (E.D. Pa. 1973).....	21
<i>Hines v. Anchor Motor Freight, Inc.,</i> 424 U.S. 554 (1976).....	9
<i>IAM v. International Air Service of Puerto Rico, Inc.,</i> 636 F.2d 848 (1st Cir. 1980).....	18
<i>Jim McNeff, Inc. v. Todd,</i> 667 F.2d 800 (9th Cir. 1982) cert. granted (No. 81-2150).....	5, 15

<i>Kennedy v. Long Island Railroad Co.</i> , 319 F.2d 366 (2d Cir. 1963).....	23
<i>Kessler Institute for Rehabilitation v. N.L.R.B.</i> , 669 F.2d 138 (3d Cir. 1982).....	19
<i>Local No. 3-193, Intl Woodworkers of America v.</i> <i>Ketchikan Pulp Co.</i> , 611 F.2d 1295 (9th Cir. 1980).....	13, 14
<i>Local Union No. 204, IBEW v. Iowa Electric Light</i> <i>& Power Co.</i> , 668 F.2d 413 (8th Cir. 1982).....	15, 16, 17
<i>Lucas v. Warner & Swasey Co.</i> , 475 F.Supp. 1071 (E.D. Pa. 1979).....	21
<i>Magnesium Casting Co. v. N.L.R.B.</i> , 401 U.S. 137 (1971).....	9
<i>Meat Cutters v. Jewel Tea Co.</i> , 381 U.S. 676 (1965).....	10, 26, 27
<i>Morgan v. Laborers Pension Trust Fund</i> <i>for Northern California</i> , 433 F.Supp. 518 (N.D. Cal. 1977).....	21
<i>N.L.R.B. v. Bell-Aerospace Co.</i> , 416 U.S. 267 (1974).....	8
<i>N.L.R.B. v. Hendricks County Rural Electric</i> <i>Membership Corp.</i> , 454 U.S. 170, (1981).....	8
<i>New Negro Alliance v. Sanitary Grocery Co.</i> , 303 U.S. 552 (1938).....	26
<i>Oil Chemical & Atomic Workers Int'l Union v.</i> <i>Standard Oil Co.</i> , 529 F.Supp. 184 (N.D. Ill., 1981).....	19
<i>Packard Motor Car Co. v. N.L.R.B.</i> , 330 U.S. 485 (1947).....	7, 8
<i>Port of Houston Authority v. International Org.</i> <i>of Masters, Mates & Pilots</i> , 456 F.2d 50 (5th Cir. 1972).....	26
<i>Prepmore Apparel v. Amalgamated Clothing Workers</i> , 431 F.2d 1004 (5th Cir. 1970).....	22
<i>Republic Steel v. Maddox</i> , 379 U.S. 650 (1965).....	20

<i>Scranton Construction Co. v. Litton Industries Leasing Corp.</i> , 494 F.2d 778 (5th Cir. 1974).....	28
<i>Smith v. Evening News Assn.</i> , 371 U.S. 195 (1962).....	9, 10, 12, 16, 19
<i>South Prairie Construction Co. v. Local 627, Int'l Union of Operating Engineers</i> , 425 U.S. 800 (1976) [<i>Peter Kiewit</i>].....	6, 8
<i>Teamsters, Local 70 v. California Consolidators, Inc.</i> , 693 F.2d 81 (9th Cir. 1982).....	13
<i>United States v. Hutcheson</i> , 312 U.S. 219 (1941).....	25
<i>United States v. National Assn. of Real Estate Boards</i> , 339 U.S. 485 (1950).....	24
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967).....	10
<i>West Point-Pepperell, Inc. v. Textile Workers Union of America</i> , 559 F.2d 304 (5th Cir. 1977).....	14

STATUTES

Clayton Antitrust Act, 15 U.S.C. §12 et seq.	2
Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 et seq.	2
Labor Management Relations Act, 29 U.S.C., §141 et seq.	2
National Labor Relations Act, 29 U.S.C. §151 et seq.	2, 5, 9
Norris-LaGuardia Act, 29 U.S.C. §101 et seq.	3
Sherman Antitrust Act, 15 U.S.C. §1 et seq.	3

LEGISLATIVE HISTORY

Joint Explanatory Statement of the Committee of Conference on ERISA, House Conference Report No. 93-1280.....	21
---	----

1
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

PRATT-FARNSWORTH, INC.,
HALMAR, INC., NEW ORLEANS
DISTRICT, ASSOCIATED GENERAL
CONTRACTORS OF LA., INC.,
AT-LARGE DISTRICT, ASSOCIATED
GENERAL CONTRACTORS OF LA., INC.,

Petitioner

V.

CARPENTERS LOCAL UNION NO. 1846
OF THE UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF
AMERICA, AFL-CIO, ET AL,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Pratt-Farnsworth, Inc., Halmar, Inc., New Orleans District, Associated General Contractors of La., Inc., and At-Large District Associated General Contractors of La., Inc. respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Carpenters Local Union No. 1846, et al v. Pratt-Farnsworth, Inc., et al*, No. 81-3222, 690 F.2d 489 (5th Cir. 1982), Rehearing and Rehearing En Banc denied __ F.2d __.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is reported at 511 F.Supp. 509 (E.D. La. 1981), and appears as Appendix "C" hereto. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 690 F.2d 489 (5th Cir. 1982), and appears as Appendix "A." The Petition for Rehearing and Suggestion for Rehearing En Banc were denied without opinion and appear as Appendix "B".

JURISDICTION

Jurisdiction of the court of appeals was entered on November 4, 1982. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant statutory provisions are:

1. Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a).
2. Sections 9, 10(e) and 10(f) of the National Labor Relations Act, 29 U.S.C. §§159, 160(e), and 160(f).
3. *Inter alia*, The Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 et seq.
4. Sections 6 and 20 of the Clayton Antitrust Act, 15 U.S.C. §17, 29 U.S.C. §52.

5. Sections 1, 2, and 3 of the Sherman Antitrust Act, 15 U.S.C. §§1-3.

6. Sections 1, 7, and 13 of the Norris LaGuardia Act, 29 U.S.C. §§101, 107, 113.

Pertinent portions of these statutory provisions are reproduced as Appendix "D."

STATEMENT OF THE CASE

The Associated General Contractors of La., Inc. is a trade organization consisting of various construction companies throughout Louisiana. It is divided administratively into several geographical districts. The New Orleans district (hereinafter "AGC New Orleans") is named as a defendant herein. Also a defendant is the At-Large District which is not limited to any geographic area (hereinafter "AGC At-Large").

Pratt-Farnsworth, Inc. is a construction company in the New Orleans area, a member of the AGC New Orleans and a defendant herein. Halmar, Inc. is also a construction company in New Orleans, a member of the AGC At-Large, and a defendant herein.

One of the activities conducted by the AGC New Orleans is to negotiate collective bargaining agreements on behalf of certain of its members with local building trades unions. The AGC New Orleans is not itself a signatory to these collective bargaining agreements; rather, the agreements are signed by member contractors, as well as certain nonmember contractors, who wish to be bound thereby.

Collective bargaining agreements were negotiated by the AGC New Orleans for the period May 1, 1971 to April 30, 1974; May 1, 1974 to April 30, 1977; and May 1, 1977 to April 30, 1980. These collective bargaining agreements are the subject of the instant lawsuit. Of all the named Defendants, only Pratt-Farnsworth is a signatory to these contracts.

The complaint alleges that Pratt-Farnsworth and Halmar are a "single employer" and, consequently, contributions to various trust funds are due from both employers under the agreement signed solely by Pratt-Farnsworth. Failure to contribute on behalf of Halmar's employees is the basis for the actions under §301 of the Labor Management Relations Act and ERISA.

The third cause of action alleges that by operating as a "double-breasted" construction company and by encouraging others to do so, all four defendants acted in restraint of trade, thus violating the Sherman and Clayton Antitrust Acts. The complaint is reproduced as Appendix "E."

The district court granted the Motions for Summary Judgment of all defendants. On appeal, the Fifth Circuit upheld the dismissals of AGC New Orleans and AGC At-Large from the §301 suit and the ERISA action. The Fifth Circuit further ruled that as to Halmar and Pratt-Farnsworth, the §301 suit and the ERISA action should be remanded to allow the Plaintiffs the opportunity to attempt to establish: (1) that Halmar and Pratt-Farnsworth are a single employer and that their employees constitute a single bargaining unit, or (2) that Halmar is the "alter ego" of Pratt-Farnsworth, and thus the collective bargaining agreement applies to both parties.

With regard to the antitrust allegations, the Fifth Circuit held that Plaintiffs might be successful in their action under two possible theories. However, it is not clear that Plaintiffs had standing to bring these antitrust actions, so the case was remanded for a ruling on the standing issue after full development of the facts by the parties.

REASONS FOR GRANTING THE WRIT

I. *THE DECISION ALLOWING A UNITED STATES DISTRICT COURT TO DETERMINE, IN THE FIRST INSTANCE, AN APPROPRIATE BARGAINING UNIT IS WRONG.*

A. The Decision Is Contrary To Supreme Court Precedent.

Section 9(b) of the National Labor Relations Act, 29 U.S.C. §179(b) gives to the National Labor Relations Board the exclusive authority to determine what unit is appropriate for collective bargaining, stating, "the Board shall decide *in each case*...the unit appropriate for the purposes of collective bargaining...."

The Supreme Court has long held that determination of an appropriate unit is a function reserved, in the first instance, to the Board and not to courts. This determination involves a weighing of highly detailed and sometimes minute facts, best suited to an administrative inquiry by an expert agency rather than a judicial tribunal. Yet, this decision not only invites a district court to determine whether or not a unit is appropriate, but whether or not unions enjoy majority status. 690 F.2d 489, 523.¹ How is this to be done?

¹ This case is thus, in some respects, similar to *Jim McNeff, Inc. v.*

Is the district court to hold an election? If so, will all the traditional safeguards of a Board conducted election be observed? Will there be a pre-election conference? Will adverse rulings be appealable to the Board? Who would be sent to monitor such an election, and where would it be conducted? Who would count the ballots? Would the district court's rulings constitute interlocutory orders from which no appeal is allowed? Perhaps the district court could check "showing-of-interest cards" submitted by a union, or appoint a magistrate to do so. Or perhaps, the district court could determine majority status by taking testimony from bargaining unit members, asking each of them to state in open court, for the record, whether they do, or do not, support the union. Would the employees then be subject to cross-examination on their desires? The difficulties involved in such an undertaking are profound and of tremendous import. They merit this court's immediate attention.

One case frequently relied upon for the proposition of Board supremacy in this area is *South Prairie Construction Co. v. Local 627, Int. Union of Operating Engineers, AFL-CIO*, 425 U.S. 800 (1976) [*Peter Kiewit*]. In that case, the Board had decided that the two operations in a "double-breasted"² construction entity were separate employers. The Court of Appeals reversed, finding the companies to be a single employer, and the employees a single bargaining

(Footnote 1 continued)

Todd, 667 F.2d 800 (9th Cir. 1982) which is currently pending before this court (No. 81-2150). There, however, the question centers around the enforceability of pre-hire agreements prior to the union's achieving majority status—not, as here, which forum shall determine that majority status.

² A construction operation in which a single enterprise operates two separate and distinct companies, one union and the other nonunion.

unit. The Supreme Court reversed on this issue stating that for the Court of Appeals to "take upon itself the initial determination of this issue was 'incompatible with the orderly function of the process of judicial review.'" 425 U.S. at 805. The Court went on to hold:

Since the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed,' *Packard Motor Co. v. NLRB*, 330 US 485, 491, 91 L.Ed. 1040, 67 S.Ct. 789 (1947), we think the function of the Court of Appeals ended when the Board's error on the 'employer' issue was 'laid bare.' *FPC v. Idaho Power Co.*, 344 US 17, 20, 97 L.Ed. 15, 73 S.Ct. 85 (1952).

425 U.S. at 805-806.

The Fifth Circuit distinguishes *Peter Kiewit* by asserting that it was decided along administrative law, rather than labor law, lines. They assert that the sentence regarding the discretion of the Board in these matters is often quoted "out of context" and does not stand for the proposition that the Board has exclusive jurisdiction to decide bargaining unit issues.

Since the sentence contains a quote from a previous Supreme Court case, putting the sentence "in context" requires a review of that earlier case. *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485 (1947), involved a decision by the Board which defined foremen as "employees" under the protection of the Act and allowed them the right to organize and bargain collectively with their employer. The Sixth Circuit entered judgment enforcing the Board's Order. The Supreme Court affirmed, describing how appropriate bargaining units are to be determined:

The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, *and none should be by decision*. It involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed. While we do not say that a determination of a unit of representation cannot be so unreasonable and arbitrary as to exceed the Board's power, we are clear that the decision in question does not do so. That settled, *our power is at an end*.

...

Whatever special questions there are in determining the appropriate bargaining unit for foremen *are for the Board*, and the history of the issue in the Board shows the difficulty of the problem committed to *its discretion*.

330 U.S. at 491-493 (emphasis supplied).³

It is respectfully submitted that *Peter Kiewit* has been misapplied by the Fifth Circuit.

Another way in which this decision bypasses the mandate of *Peter Kiewit*, is by casting the case (correctly) as a §301 contract action, to which the representation question is merely peripheral; then analogizing to the situation

³ The result in *Packard* (that foremen enjoy the protection of the Act) was, of course, legislatively overruled by Congress when it amended the Act. The essential holding of *Packard*, however, remains good law. The Supreme Court has reiterated the philosophy of Board supremacy regarding representation questions in other contexts. *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (managerial employees); *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171 (1971) (retired employees; Board's order denied enforcement); *N.L.R.B. v. Hendricks County Rural Electric Membership Corp.*, ___ U.S. ___, 70 L.Ed.2d 323 (1981) (confidential employees).

in which a district court does have jurisdiction over a §301 action to which an unfair labor practice is peripheral.⁴ Citing such Supreme Court cases as *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) and *Smith v. Evening News Assn.*, 371 U.S. 195 (1962), the court reasoned that if district courts have jurisdiction to decide unfair labor practices that are under the "exclusive" jurisdiction of the Board, they also have jurisdiction to decide representation questions which are also under the "exclusive" jurisdiction of the Board.

The difference between the two situations is manifest and embedded in the very heart of the National Labor Relations Act. Sections 10(e) and 10(f), 29 U.S.C. §160(f), provide specifically for court review of unfair labor practices. The Board's orders are not even self-enforcing—they *must* be brought to an appropriate court of appeals for enforcement. There is no such provision regarding representation questions. To the contrary, the Board's decisions regarding such issues as unit placement, majority status, jurisdiction, and so forth, are not only exclusive, but *unreviewable* in any court. The only way such matters ever come to the attention of a court of appeals is through a subsequent unfair labor practice proceeding in which the representation issue becomes part of the record. *Magnesium Casting Co. v. N.L.R.B.*, 401 U.S. 137 (1971).

Thus, the policy favoring judicial enforcement of collective bargaining contracts is strong enough to sustain the jurisdiction of district courts over §301 suits even though the conduct is also an unfair labor practice. It is not strong enough, however, to overcome the statutory mandate that it is the Board which decides representation issues.

⁴ The pertinent text is found in Appendix "D".

A further underpinning of the decision was *Connell Construction Co. v. Plumbers Union, Local 100*, 421 U.S. 616 (1975), in which the Supreme Court held that federal courts may decide labor law questions that emerge as "collateral issues" in suit brought under independent federal remedies, including the antitrust laws. From this, the panel reasoned that a federal court could also decide representational questions if they emerge as collateral issues to a §301 action.

That is an unwarranted extension of *Connell*. The specific holding in question is found at 421 U.S. 616, 626, and cites as support *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), *Vaca v. Sipes*, 386 U.S. 171 (1967), and *Smith v. Evening News Assn.*, 371 U.S. 195 (1962). By no reasonable stretch of imagination do those cases support the proposition that a federal court may, in a §301 suit, initially determine representational issues.

At issue in *Jewel Tea*, was a union-imposed restriction on hours of operations of meat departments. This had a substantial anticompetitive impact on unionized groceries. The Meat Cutters Union asserted that the hours restriction was a mandatory term or condition of employment and, therefore, the Board possessed exclusive jurisdiction to determine its legality. The Supreme Court rejected that argument, stating three reasons. First, although classifying bargaining subjects and "terms or conditions" of employment may be one of the Board's most common functions, it is not an inquiry for which the Board is *uniquely* suited—courts must make the same determination in other contexts. Second, the conspiracy as originally alleged in *Jewel Tea* made no mention of terms or conditions of employment. It was only at trial that this became important. Thus, when the suit was brought the issues

were framed so that a Board determination would be of "subsidiary importance" to the case's disposition. Third, Board procedures presented no available means to invoke jurisdiction—the Union would not raise it because it agreed with the contract, and the Company could not raise it because the six-month statute of limitations had run.

These observations are not pertinent here. The Carpenters Union may file refusal to bargain charges against Halmar and Pratt-Farnsworth if it wishes. Board procedures are fully open at this stage.⁵ Also, this lawsuit and the potential unfair labor practice proceeding do not involve different spheres of federal law; any determination the Board might make would certainly be of much more than subsidiary importance to the §301 suit. Finally, the Board, which was created to rule on representation questions, can be said to be uniquely qualified to determine this issue.

In *Vaca v. Sipes*, this Court held that an employee's suit against a union for breaching its duty of fair representation is not barred merely because that breach is also an unfair labor practice. This was a necessary and common sense decision in light of the fact that the concept of fair representation is not found in the National Labor Relations Act. It is purely a judge-made and court-fashioned remedy. The Court in *Vaca*, chided the Board for its "tardy" assertion of jurisdiction in fair representation cases. Again, the Board could hardly be said to be *uniquely* qualified to determine breach of fair representation cases.

⁵ The fact that they may also be open to the Defendants, as pointed out in the decision, is irrelevant. The Defendants should not be forced to file a unit clarification petition if they are content with the unit as it currently exists.

Smith v. Evening News Assn. was the original case in which the Supreme Court first held that courts may hear claims under §301 even though the same claims could be asserted in unfair labor practice proceedings.⁶ The Court noted the Board sometimes declined to exercise its unfair labor practice jurisdiction when the parties had chosen arbitration. 371 U.S. at 198 note 6.

But that situation is, again, not analogous to the situation at bar. Arbitration decision are reviewable if they deal with rights protected by the NLRA, and are reviewable by courts regardless of their subject matter. A district court unit determination as called for in *Pratt-Farnsworth* would be unreviewable by the Board.

Finally, the reasoning that courts may decide representation issues which are peripheral to a §301 action misapprehends the true nature of this lawsuit. The desire of the union to represent, bargain for, and obtain contributions to the pension funds on behalf of the currently unrepresented employees of Halmar, is not peripheral to this lawsuit—it is the very heart and soul of this lawsuit. The proper forum therefore, is the one Congress has designated to handle such questions, the National Labor Relations Board.

B. The Decision Conflicts With The Decisions Of Other Circuit Courts Of Appeals

No circuit court of appeal has reached the same con-

⁶ As part of its rationale, the Supreme Court relied upon the views of the Board, which had filed an *amicus curiae* brief, asserting that ousting the courts of jurisdiction under §301 in this case would not only fail to promote, but would actually obstruct, the purposes of the Labor Management Relations Act.

clusion as the Fifth Circuit in this case, and several have ruled to the contrary.

The clearest and most distinct conflict with *Pratt-Farnsworth* is *Teamsters, Local 70 v. California Consolidators, Inc.* 693 F.2d 81 (9th Cir. 1982). There the Teamsters represented the employees of Marathon Delivery Services. They sought to show in a §301 action that Marathon was a single employer with California Consolidators, Inc. The Ninth Circuit, in light of the *Peter Kiewit* decision held, correctly, that while §301 grants a district court jurisdiction to decide whether employers constitute a single employer, it does not extend to the second part of the issue, the appropriateness of the bargaining unit. This relief is "a representational question reserved in the first instance to the Board." 693 F.2d at 84.

California Consolidators, presents the conflict in its purist form, shorn of any side issue which could possibly distinguish it from the Fifth Circuit's contrary ruling in *Pratt-Farnsworth*. There are several other cases, however, which, using the same reasoning as *California Consolidators*, come to the same conclusion in slightly different factual settings.

In *Local No. 3-193 Int'l Woodworkers of America v. Ketchikan Pulp Co.*, 611 F.2d 1295 (9th Cir. 1980) a union and a company agreed to a contract covering a single operation. The employer then acquired several other operations but refused to recognize the union as having jurisdiction over these operations under the bargaining agreement. The union sought court enforcement of an accretion clause in the contract which the district court dismissed.

On appeal, for the first time, the jurisdictional issue was raised. Apparently *sua sponte*, the Ninth Circuit suggested "the District Court lacked jurisdiction under Section 301 because the issue here is in reality a representational issue, not a contract issue, and the National Labor Relations Act vests exclusive authority in the NLRB to pass on questions of representation." 611 F.2d at 1298.

In *Ketchikan* as in *Pratt-Farnsworth*, neither party saw fit to involve the primary jurisdiction of the Board. The Ninth Circuit refused to accept jurisdiction on this basis citing, ironically, the Fifth Circuit's holding in *West Point-Pepperell, Inc. v. Textile Workers Union*, 559 F.2d 304 (5th Cir. 1977), that NLRB jurisdiction in such a case is always exclusive. The Ninth Circuit did not rule that there could *never* be a situation in which the Board's authority was not exclusive, but did hold that in the area of (1) the designation of exclusive bargaining agents, and (2) identification of appropriate collective bargaining units the Board's jurisdiction is "primary, if not exclusive."

The court also cited *Peter Kiewit* which it called "particularly illuminating." In analyzing that case, the Ninth Circuit held:

This declaration of the strong policy of judicial deference to initial determination by the NLRB of representation issues is *equally applicable* to actions under Section 301. In the present case, the Union is attempting an end run around Section 9 of the Act and under the guise of contract interpretation wants to avoid self-determination of a bargaining agent by a substantial number of employees and the termination of an appropriate bargaining unit by the NLRB, which has primary authority in this area. This cannot be countenanced.

611 F.2d at 1299-1300, (emphasis added).

It is respectfully submitted that *Ketchikan* and *Pratt-Farnsworth* represent another split which cannot be reconciled. In both, unions attempted to bring representational issues to the attention of a district court under the guise of a contract interpretation dispute seeking damages for the loss of initiation fees and dues; in both, Board procedures were available, but unused.⁷

The Eighth Circuit dealt with this problem in *Local Union No. 204 of the Int'l Brotherhood of Electrical Workers v. Iowa Electric Light & Power Co.*, 668 F.2d 413 (8th Cir. 1982), and came to the same conclusion as the Ninth Circuit. In *Iowa Electric*, several employees who were not then members of an existing bargaining unit desired union representation. Pursuant to procedures in the collective bargaining agreement, the union petitioned the NLRB for accretion. The union was certified but *Iowa Electric* refused to negotiate, maintaining that the unit was not appropriate.

Instead of filing an unfair labor practice charge, as might have been expected, the union filed a grievance under the contract. When the company continued to refuse to discuss the matter on these grounds, the union filed suit under §301 for breach of the collective bargaining agreement.

⁷ Cf., *Jim McNeff, Inc. v. Todd*, 667 F.2d 800 (9th Cir., 1982) cert. gtd. No. 81-2150—"Re-creation of past relationships for the purpose of resolving factual disputes is one of the traditional functions of a trial court, and not a process in which the N.L.R.B. has any extraordinary expertise. Therefore, in this opinion we do not extend the District Court's jurisdiction into an area in which the N.L.R.B. exercises exclusive authority." 667 F.2d at 804 (emphasis added)

The district court granted summary judgment to the plaintiff holding there was no genuine issue of material fact. On appeal, the Eighth Circuit concluded that before turning to the district court's analysis of the case, it must first answer the question of "whether a union representational matter, like that before this court, which is committed to the jurisdiction of the NLRB...may also serve as the basis for a §301 contract violation suit in the district court." 668 F.2d at 415-416. Unlike the Fifth Circuit in *Pratt-Farnsworth*, the Eighth Circuit answered that question in the negative.

The Eighth Circuit first pointed out that under *Smith v. Evening News Assn.*, the fact that a particular activity may constitute an unfair labor practice does not necessarily preclude the district court's jurisdiction under §301, but then continued,

However, we are unable to find any case in which this rule has been held to apply to *representational* matters within the Board's jurisdiction under section 9....Instead, representational matters have been almost invariably processed administratively through the NLRB...with judicial review of the Board's determination by the courts of appeals under section 10 of the Act....[Citing *Ketchikan* and *Peter Kiewit*]

668 F.2d at 416 (emphasis added).

Again, ironically, the Eighth Circuit chose to cite the Fifth Circuit's *West Point-Pepperell* case when it held flatly that "a dispute over a representational matter is a situation calling for a denial of district court jurisdiction." *Id.* at 416. Had the Fifth Circuit also chosen to follow *West Point-Pepperell*, it too would have denied district court jurisdiction.

It is clear that like *Ketchikan, Iowa Electric* cannot be reconciled with the *Pratt-Farnsworth* decision. In both cases a union alleged a breach of a collective agreement by the company's "engaging in activity to defeat or evade the terms of the agreement." 668 F.2d at 413. In both cases, the union's desire to represent currently unrepresented employees underlies the genesis of the suit. In both cases, unfair labor practice proceedings were available, but unused. Yet in *Iowa Electric*, the court chose to echo the Ninth Circuit's characterization of the case as an attempt to bring an "end run" around provisions of the NLRA under the guise of contract interpretation under §301.

It is suggested that the Eighth Circuit's analysis of this area is a reasonable one. The court chose to draw a line between those cases where the district court has jurisdiction under §301 and those in which it does not, by examining the major issues to be decided. If the issues are primarily contractual, the district court should assume jurisdiction. If they are primarily representational, the district court should not. Under this analysis it is not necessary to determine whether the Board's jurisdiction is "exclusive" or "primary" in representational cases:

Regardless of whether NLRB jurisdiction under section 9 of the Labor Management Relations Act over representational issues like accretion to the existing bargaining unit is viewed as being exclusive or primary, it is clear that the district court in the instant case erred in concluding that it had jurisdiction to entertain this section 301 action.

668 F.2d at 420.⁸

⁸ It is especially important to note that in the *Iowa Electric* case,

Finally, the First Circuit's decision in *Int'l Assn. of Machinists v. Int'l Air Service of Puerto Rico, Inc.*, 636 F.2d 848 (1st Cir. 1980), contains dicta which indicates that the First Circuit is also in disagreement with the Fifth. In that case, an employer allegedly breached its contractual duty to notify the union when it hired various employees to perform services for airlines serviced by the company. The union maintained that these employees fell within the bargaining unit, and sought arbitration. The district court dismissed the case both on the merits of the grievance, and because it did not have jurisdiction over a "controversy of representation" which falls under the jurisdiction of the Board.

The First Circuit held first that the district court should not have reached the merits of the grievance. As to the jurisdictional issue, the court agreed that it was possible to construe this as a representational question and representational questions were "committed exclusively to the Board." 636 F.2d at 848. However, the court went on to analyze the strong labor policy which supplies a preference for interpreting questions as arbitrable in such a situation.

Nevertheless, it seems clear that under this theory, and this reasoning, the First Circuit, if presented with a question such as that in *Pratt-Farnsworth*, would rule consistently with its *Air Service* holding, that the Board has

(Footnote 8 continued)

the National Labor Relations Board is in accord. It filed an *amicus curiae* brief urging that the sound formulation of national labor policy requires that the Board have primary jurisdiction over representational matters and that the district court has no jurisdiction to review the Board's decision in a representational proceeding or to decide these issues *de novo*.

primary jurisdiction of representational questions and courts should not decide them under the guise of a §301 action. See also, *Kessler Institute for Rehabilitation v. N.L.R.B.*, 669 F.2d 138 (3d Cir. 1982) ("we are not free to circumvent the Board's jurisdiction to make the initial determination on the merits"); *Computer Sciences Corp. v. N.L.R.B.*, 677 F.2d 804 (11th Cir. 1982) (interprets *Peter Kiewit* as holding "primary jurisdiction of Board to determine appropriate bargaining unit precludes court of appeals' determination of question in the first instance"); *Oil Chemical & Atomic Workers Int'l Union v. Standard Oil Co.*, 529 F.Supp. 184 (N.D. Ill. 1982), and *Couchigian v. Rick*, 489 F.Supp. 54 (D. Minn. 1980).

II. BOTH THE ERISA AND THE SECTION 301 ALLEGATIONS SHOULD HAVE BEEN DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

The Fifth Circuit held that even though the unions failed to attempt to exhaust grievance and arbitration procedures, the lawsuit should not be dismissed as it is not clear whether or not these procedures were mandatory. 690 F.2d 489, 528.

We respectfully urge that this is an incorrect statement of the law. The Supreme Court has held that it is the *attempt* to exhaust grievance and arbitration procedures which is mandatory, not that the procedures themselves must be mandatory.

The doctrine of exhaustion of contractual grievance and arbitration procedures prior to bringing a §301 suit was first raised, by implication, in *Smith v. Evening News Assn.*, 371 U.S. 195 (1962) at footnote 1. This was later

clarified in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) where this Court held:

As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress.

379 U.S. at 652 (emphasis in the original).

In *Maddox*, the collective bargaining agreement in question was similar to that in the case at bar, in that it contained potentially conflicting language regarding whether or not a grievance "must" or "may" be brought. The Supreme Court analyzed this problem as follows:

The language stating that an employee 'may discuss' a complaint with his foreman is susceptible to various interpretations; the most likely is that an employee may, if he chooses, speak to his foreman himself without bringing in his grievance committeeman and formally embarking on Step 1. Use of the permissive 'may' does not of itself reveal a clear understanding between the contracting parties that individual employees, unlike either the union or the employer, are free to avoid the contract procedure and its time limitations in favor of a judicial suit. *Any doubts must be resolved against such an interpretation.*

379 U.S. at 658-659 (emphasis supplied).

Maddox thus stands for the proposition that a prerequisite to a §301 suit is an attempt to exhaust any existing

grievance or arbitration procedure, whether mandatory or permissive. The petitioners are unaware of any circuit court which has, until now, held otherwise.

This argument applies with equal force to proceedings under ERISA. The legislative history of ERISA is set out in the Joint Explanatory Statement of the Committee of Conference on ERISA, House Conference Report No. 93-1280 (U.S. Code Cong. and Adm. News, 93rd Congress, Second Sess. (1974) P. 5038 *et seq.*) This history shows that all actions under ERISA to enforce benefit rights under a covered plan or to recover benefits under the plan whether brought in federal or state courts "are to be regarded as arising under the laws of the United States in similar fashion to those brought under §301 of the Labor-Management Relations Act of 1947." U.S. Code Cong. and Adm. News, *supra* at 5107.

Sound policy requires that the exhaustion doctrine, which is a prerequisite to a §301 suit, be applied with equal force to a suit arising under ERISA and many courts have so held. See *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980); *Lucas v. Warner & Swasey Co.*, 475 F.Supp. 1071 (E.D. Pa. 1979); *Morgan v. Laborer's Pension Trust Fund for Northern California*, 443 F.Supp. 518 (N.D. Calif. 1977); *Fox v. Merrill Lynch & Co.*, 453 F.Supp. 561 (S.D. N.Y. 1978); *Hammil v. Hoover Ball & Bearing Co.*, __ F.Supp. __, 85 LRRM 2231 (E.D. Pa. 1973).

III. THIS CONTROVERSY IS A LABOR DISPUTE AND THEREFORE EXEMPT FROM THE FEDERAL ANTITRUST LAWS.

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), involved a suit by an employer against members of a union

for conducting a violent sit-down strike and thereby forcing its business to close. The company contended that this action restrained interstate commerce. Because the employer's goods were effectively prevented from entering interstate commerce, the labor activities involved undoubtedly would have constituted an antitrust violation under prior case law. The Supreme Court held, however, that this was not the kind of restraint at which the Sherman Act was aimed. Rather, said the Court:

The end sought was the prevention of restraints to free competition *in business and commercial transactions* which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury. [Footnote omitted, emphasis supplied]

310 U.S. at 493.

Since this is what "restraint of trade" actually means, the conduct of the union was not covered by the Act and the suit was dismissed. It did not matter that the union's conduct may have been illegal or violent—it still was exempt from antitrust prosecution since there was no restraint on *commercial competition*.

This rationale was applied by the Fifth Circuit in *Prepmore Apparel v. Amalgamated Clothing Workers*, 431 F.2d 1004 (5th Cir. 1970), where a labor union claimed the defendant employer had conspired with a competitor (Blue Bell) to destroy the union's local operation by refusing to deal with it concerning wages and conditions of employment. *Prepmore* thus dealt with the same issue as *Pratt-Farnsworth*, i.e., whether employers may engage in con-

certed activities to avoid labor unions. The Fifth Circuit dismissed the Sherman Act claim in *Prepmore*, holding that the alleged conduct by defendants did not constitute a restraint on commercial competition in the marketing of goods and services.

The Second Circuit reached a similar conclusion in *Kennedy v. Long Island Railroad Co.*, 319 F.2d 366 (2d Cir. 1963), in which antitrust allegations were brought against several railroads for entering into a "strike insurance plan." The court held these assertions failed to state a claim "for the fundamental reason that the named statutes were designed principally to outlaw restraints upon commercial competition in the marketing and pricing of goods and services and were not intended as instruments for the regulation of labor management relations." 319 F.2d at 372-373.

The Supreme Court recently reaffirmed this fundamental premise in *H.A. Artists & Assoc. v. Actors Equity Assn.*, 451 U.S. 704, (1981). In that case, this Court scrutinized a system whereby a union representing most stage actors and actresses established a licensing requirement for the regulation of theatrical agents. Union members were forbidden to deal with agents who refused to accept the regulations or apply for franchises from the union. A group of agents who refused to accept the regulations or apply for franchises brought suit in the Southern District of New York contending that the union's regulation of theatrical agents violated the Sherman Act. The Supreme Court affirmed the decisions of the district court and the Second Circuit which held that this agreement was exempt from Sherman Act scrutiny in that it was a labor dispute, and further that the matter in issue did not involve "commercial competition." As the Court noted:

[In *Apex Hosiery*] the court reasoned that the Sherman Act prohibits only restraints on 'commercial competition,'...or those market restraints designed to monopolize supply, control prices, or allocate product distribution—and that unions are not liable where they merely further their own goals in the labor market.

451 U.S. at 715, note 16.

Thus, just as unions are not liable where they merely further their own goals in the labor market, so employers are not liable when they further their own goals in the labor market—as opposed to their goals in the commercial market which goals are, of course, the purpose of Sherman Act scrutiny. *United States v. National Assn. of Real Estate Boards*, 339 U.S. 485 (1949).

The Fifth Circuit accepted this basic rationale, but misapplied it. The court properly analyzed the major concern of the unions as being "the effect the defendants' alleged conspiracy will have on the ability of the union to represent their member employee," and held that to the extent the pleadings alleged merely a concerted refusal to deal with the union in an attempt to restrain competition in wages and working conditions, they did not state a cause of action under the antitrust law. (690 F.2d at 534)

The court went on, however, to analyze the pleadings as somehow alleging a concerted refusal to deal not with the unions themselves, but with other contractors who hire union workers, or to allege a concerted refusal to deal with contractors who did not create "double-breasted" union-nonunion arrangements. The court then concluded that these were allegations which involved an anti-competitive

restraint in the area of competition for services of contractors, though it expressed doubt whether the unions had standing to bring such an action.

It is respectfully submitted that this misapprehends the nature of the lawsuit and ignores established law which determines what is a "labor dispute," as will be shown below.

United States v. Hutcheson, 312 U.S. 219 (1941), involved a case in which criminal charges had been brought under the Sherman Act against the Carpenters Union for engaging in a strike over a jurisdictional dispute with the Machinists Union. In its analysis of this issue, the Supreme Court held that whether or not this contract violated the Sherman Act "is to be determined only by reading the Sherman Law and §20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." 312 U.S. at 231. Thus, the case stands for the general proposition that all three of these laws must be read together in order to determine the proper accommodation of federal labor goals and federal antitrust goals. It is clear then that a "labor dispute" within the meaning of the Norris-LaGuardia Act is a "labor dispute" within the meaning of §20 of the Clayton Act and thereby exempt from antitrust considerations under the Sherman Act.

Section 13 of the Norris-LaGuardia Act supplies definitions which easily extend to cover the situation in the instant case, namely one which involved "persons who are engaged in the same industry" and which involves "terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or condi-

tions of employment," even though as regards some of the plaintiffs and some of the defendants, the disputants do not "stand in the proximate relation of employer and employee."

The term "labor dispute" has been broadly defined judicially, as well. See, for example, *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938) (picketing against racial discrimination in employment, although none of the protestors were employees); *Port of Houston Authority v. Int'l Org. of Masters, Mates & Pilots*, 456 F.2d 50 (5th Cir. 1972) (informational picketing against use of foreign ships); *Corporate Printing Co. v. New York Typographical Union No. 6*, 555 F.2d 18 (2d Cir. 1977) (union's organizing of managerial employees who were not covered under the National Labor Relations Act).

In *Hutcheson*, *supra*, as well as the other cases cited, the courts recognized that the statutory exemption provided by the Clayton and Norris-LaGuardia Acts applies only so long as there is not an agreement or concerted activity between the labor union and non-labor groups. Thus, while *disputes between unions and non-labor groups*, are exempt from antitrust scrutiny, agreements between unions and employers may be violative of the Sherman Act if they restrain trade. Of course, accommodation between federal policy regarding labor law and federal policy regarding monopolies requires that some union-employer agreements be accorded a limited non-statutory exemption from antitrust sanctions. *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).

As explained recently in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), a detailed examination of the union-employer agree-

ment must be made to determine whether such agreements impose a "direct restraint on the business market" that "would not *follow naturally* from the elimination of competition over wages and working conditions" and whether the restraint on the business market has a substantial anti-competitive effect which "contravenes antitrust policies to a degree not justified by congressional labor policy...." 421 U.S. at 625 [emphasis supplied].

The agreement scrutinized in *Connell*, required a general contractor to subcontract only with those companies already signatory to a collective bargaining agreement with the defendant union. Within the jurisdiction of the union, therefore, the general contractor was forbidden to subcontract to any nonunion company regardless of economic considerations. This was an unreasonable restraint on the market and did not "follow naturally" from the elimination of competition on wages. To that extent the agreement between *Connell* and the union was not exempt.

There is no such agreement in the instant case. Rather, the agreement in question is a typical collective bargaining agreement negotiated at arm's length between a council of unions and an employer association. It contains no illegal provisions such as those found in *Connell*.

It has been stated that "judges should not, under cover of the Sherman Act umbrella, substitute their economic and social policies for free collective bargaining." *Meat Cutters Union v. Jewel Tea Company, Id.*, at 726 (1965) (Goldberg, dissenting and concurring opinion). What was true then is equally true now.

Recognizing that the Sherman Act is not "a panacea

for all business affronts which seem to fit nowhere else," *Scranton Construction Co. v. Litton Industries Leasing Corp.*, 494 F.2d 778, 783 (5th Cir. 1974), the district court properly analyzed this case when it held:

In the instant case, the plaintiff unions and class members are complaining of collective bargaining obstruction and consequent injury to union functions and representation. This controversy can only be characterized as a labor dispute initiated by construction industry employees against their employers and the employer associations. Accordingly, the antitrust laws do not provide a vehicle for challenging the practices under attack in this suit.

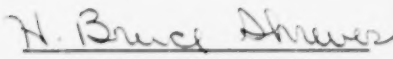
511 F.Supp. at 515-16.

CONCLUSION


The Fifth Circuit's opinion in the present case constitutes a serious departure from labor laws and antitrust policies. This case merits the review of this Court.


JAMES BURTON


FREDERICK S. KULLMAN
(COUNSEL OF RECORD)


H. BRUCE SHREVES
Simon, Peragine, Smith &
Redfearn
4300 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 522-3030

Counsel For Petitioners
Pratt-Farnsworth, Inc. and
Halmar, Inc.


MICHAEL S. MITCHELL
Kullman, Lang, Inman & Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
Telephone: (504) 524-4165

Counsel For Petitioner

CERTIFICATE

I, Frederick S. Kullman, hereby certify that I have on this 18th day of February, 1983, caused three copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to be served by United States Mail, postage prepaid, upon the following counsel of record for Respondent:

Ms. Marie Healey
Mr. Jerry L. Gardner, Jr.
Attorneys at Law
Barker, Boudreaux, Lamy, Gardner & Foley
1400 Richards Building
New Orleans, Louisiana 70112

A handwritten signature in cursive script, reading "Frederick S. Kullman", written over a horizontal line.